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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY WINDELL LEE,

Defendant and Appellant.

2d Crim. No. B207937
(Super. Ct. No. 2002010272)
(Ventura County)

Bobby Windell Lee appeals a judgment following his conviction of kidnapping. (Pen.Code, § 207, subd. (a).)¹ He has two prior strike convictions. The trial court found that he fell within the purview of the Three Strikes law and sentenced him to a term of 25 years to life for the kidnapping count. It also imposed two five-year consecutive terms for prior serious felonies (§ 667, subd. (a)) and three one-year consecutive sentences under section 667.5, subdivision (b). We conclude that the court did not abuse its discretion by deciding not to strike one of Lee's two prior strike convictions. We affirm.

¹ All statutory references are to the Penal Code.

FACTS

On November 29, 2004, we affirmed Lee's conviction for kidnapping and reversed his conviction for assault with a deadly weapon. (*People v. Lee* (Nov. 29, 2004, B166204).) We remanded for resentencing.

Lee's kidnapping conviction was his third strike under the Three Strikes law. He filed a motion to strike requesting the trial court to exercise its discretion to strike one of his prior convictions (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) at the resentencing hearing.

In his motion, Lee conceded that he "has not lived a crime free life." He said he "is a drug user" and his criminal history includes committing "thefts and drug related crimes." But he claimed that he "does not murder, sexually assault people, burgle houses, or (since 1980) rob people." He said "the imposition of 3 strikes is not in the interest of justice."

The trial court rejected Lee's request to strike a prior. It found that "to grant a Romero motion here, I'd have to find, essentially, that Mr. Lee is outside the scope of the three-strikes law, not within the sphere of that law. And I certainly could not make such a finding based on the record which he brings before the Court." It said, "[A]lthough his strikes are in one sense somewhat old, he is not leading a legally blameless life since he first entered the justice system." The court recognized that Lee had "a significant substance abuse problem." But it found that he "has never really been under control" and that "periodically" he acts "out in ways which reflect violent tendencies"

DISCUSSION

Not Striking a Prior Strike Conviction

Lee contends the trial court committed reversible error by deciding not to strike one of his two prior strike convictions. We disagree.

A trial court has discretion on its own motion to strike a prior strike conviction under the Three Strikes law. (*People v. Superior Court (Romero)*, *supra*, 13

Cal.4th at p. 504.) The standard for deciding whether to strike a prior is well established. "[T]he court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit" (*People v. Williams* (1998) 17 Cal.4th 148, 161.) If so, the defendant "should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*)

But once a career criminal commits the requisite number of strikes, the "circumstances must be 'extraordinary'" before he or she "can be deemed to fall outside the spirit of" the Three Strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

The standard of review on appeal is whether the trial court abused its discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 375.) The appellant must show that the court's decision is "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

Lee argues that his first prior strike in 1980 occurred when he was "only 19 years old," and the second prior strike conviction in 1994 was for criminal threats (§ 422), which he claims "in no way equates to the serious crimes of murder, mayhem, rape"

But his 1980 prior strike was for robbery, and the 1994 conviction for criminal threats is by definition a "serious felony." (§ 1192.7, subd. (c)(38); *People v. Moore* (2004) 118 Cal.App.4th 74, 76.) Moreover, his current third strike is for kidnapping, a serious offense. In his motion to strike, Lee conceded that he "deserves prison for the kidnapping crime," and he admitted that he "kidnapped *and hit his girlfriend several times.*" (Italics added.)

Lee claims that there is a substantial time span between his three strikes. But that is not a positive factor where the defendant "did not refrain from criminal activity during that span of time, and . . . did not add maturity to age." (*People v.*

Williams, supra, 17 Cal.4th at p. 163.) Nor is it a favorable factor where the defendant was in and out of custody for substantial periods during that time. (*Ibid.*)

Here, in addition to Lee's juvenile history, he committed numerous offenses throughout the 1980's, the 1990's, and he spent a substantial period of time in and out of custody. His criminal history spans a substantial portion of his adult life. His record is not confined to an isolated period of aberrant behavior or to youthful indiscretions. The trial court could reasonably find that Lee fell within the spirit of the Three Strikes law because he was a chronic recidivist. (*People v. Williams, supra*, 17 Cal.4th at pp. 163-164; *People v. Philpot* (2004) 122 Cal.App.4th 893, 904-906.) The probation officer stated in her report that Lee "has been involved *in the criminal justice system for over thirty years.*" (Italics added.) In his motion to strike, Lee conceded that he had "a long criminal history." The Three Strikes law was enacted to target the revolving door offender. The court could reasonably infer from his record that Lee was one.

Lee suggests that his offenses were not violent crimes. But the trial court could reasonably find that this was not the case. Lee had a robbery and a kidnapping conviction. In the 1990's he had several convictions under section 273.5 (inflicting corporal injury). The probation report indicated that these offenses were for "injuring his former girlfriends and/or wives." In addition, in his motion, Lee also admitted that at the time he committed his second prior strike for criminal threats, he had also hit his son with a belt and his conduct was "reprehensible." The probation report indicates that Lee was convicted under section 273d of inflicting corporal injury upon the child in 1994. Lee also admitted that in connection with the current offense, he had "hit his girlfriend several times."

Some of his prior domestic offenses, according to Lee, were the result of "substance abuse," and he suggests that the trial court did not consider that factor. We disagree. The court recognized that he had this problem. But it also noted that he had not rehabilitated himself, his addiction was not under control and he had a history of

violence. The nature of his offenses did not decrease in seriousness with age and maturity because his latest offense was a kidnapping.

The trial court's finding that Lee fell within the spirit of the Three Strikes law is supported by the record. Lee has not shown an abuse of discretion.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Kevin J. McGee, Judge
Superior Court County of Ventura

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